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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Case No. 75-1725

MONTGOMERY COUNTY COMMUNITY
ACTION AGENCY

Petitioner

v.

JAMES W. POWERS

Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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TABLE OF CONTENTS

Page

I. JURISDICTION 1

II. QUESTION PRESENTED 2

A. Is a Community Action Agency, organized, operating and existing as an Ohio non-profit corporation pursuant to Chapter 1702, *Ohio Revised Code*, immune from suit in state courts on the basis of governmental immunity?

B. Do Common Pleas Courts, as courts of general jurisdiction in Ohio, have subject matter jurisdiction over Community Action Agencies organized, operating and existing under the laws of the State of Ohio?

III. STATUTES INVOLVED. 2

IV. REASONS FOR NOT GRANTING WRIT 3

A. A Community Action Agency, organized, operating and existing as an Ohio non-profit corporation pursuant to Chapter 1702, *Ohio Revised Code*, is not immune from suit in state court on the basis of governmental immunity.

B. Common Pleas Courts, as courts of general jurisdiction in Ohio, have subject matter jurisdiction over Community Action Agencies, organized, operating and existing under the laws of the State of Ohio.

Page

V. CONCLUSION 10

APPENDIX

A. Opinion of the Court of Appeals of Montgomery County, Ohio, Dated November 1, 1975. .....1a

B. Certificate of Service. 6a

CITATIONS

Cases: Page

Fox Film Corporation v. Muller, 296 U.S. 207 (1935) 2

Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (5th Cir., 1973) 7, 9, 10

Johnson v. Jumelle, 359 F. Supp. 351 (S.D.N.Y. 1973) 7, 8

Mitchell v. Boys Club of Metropolitan Police, D.C., 157 F. Supp. 101, 107 (D.D.C. 1957) 8, 10

Orleans v. United States, 509 F.2d 197 (6th Cir., 1975) 3

PAAC v. Rizzo, 502 F.2d 306 (3rd Cir., 1974) 4, 5, 6

Robles v. El Paso Community Action Agency, Project Bravo, Inc., 456 F.2d 189 (5th Cir., 1972). 6, 7, 9

Vincent v. United States, 513 F.2d 1296 (8th Cir., 1975) 4

Statutes:

42 U.S.C. § 2781 (a) 8

42 U.S.C. § 2791 (e) 8

42 U.S.C. § 2802 (e) 8

Chapter 1702, *Ohio Revised Code* 1, 2, 4, 6

1702.12, *Ohio Revised Code* 2

1702.12 (A), *Ohio Revised Code* 2, 3, 10

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I. JURISDICTION

The Supreme Court of the State of Ohio overruled Petitioner's motion to certify the Opinion and Judgment Entry of the Court of Appeals of Montgomery County, Ohio. The Court of Appeals Opinion (page 1a of Appendix) concluded that Petitioner cannot change its statutory identity from a non-profit corporation organized under Chapter 1702, *Ohio Revised Code*,

for the sole purpose of avoiding liability under the doctrine of sovereign immunity.

This Court has consistently held that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question may be involved. The Court of Appeals expressly found that Petitioner is an Ohio corporation, which was organized and exists as a non-profit corporation pursuant to Chapter 1702 of the *Ohio Revised Code*. This fact has been admitted by Petitioner. The Court of Appeals further found that § 1702.12 (A), *Ohio Revised Code*, provides that a private non-profit corporation may sue and be sued. This fact has also been admitted by Petitioner. The Court of Appeals based its decision on state law, not federal law. Thus, the Supreme Court of the United States is without jurisdiction to review since the nonfederal ground is independent of the federal ground raised by Petitioner and the non-federal ground is adequate to support the judgment of the Ohio trial and appellate courts. *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935).

II. QUESTIONS PRESENTED

A. Is a Community Action Agency, organized, operating and existing as an Ohio non-profit corporation pursuant to Chapter 1702, *Ohio Revised Code*, immune from suit in state courts on the basis of governmental immunity?

B. Do Common Pleas Courts, as courts of general jurisdiction in Ohio, have subject matter jurisdiction over Community Action Agencies organized, operating and existing under the laws of the State of Ohio?

III. STATUTES INVOLVED

Section 1702.12 (A), *Ohio Revised Code*, provides in

pertinent part:

(A) A corporation may sue and be sued.

IV. REASONS FOR NOT GRANTING WRIT

A. A COMMUNITY ACTION AGENCY, ORGANIZED, OPERATING AND EXISTING AS AN OHIO NON-PROFIT CORPORATION PURSUANT TO CHAPTER 1702, OHIO REVISED CODE, IS NOT IMMUNE FROM SUIT IN STATE COURT ON THE BASIS OF GOVERNMENTAL IMMUNITY.

B. COMMON PLEAS COURTS, AS COURTS OF GENERAL JURISDICTION IN OHIO, HAVE SUBJECT MATTER JURISDICTION OVER COMMUNITY ACTION AGENCIES, ORGANIZED, OPERATING AND EXISTING UNDER THE LAWS OF THE STATE OF OHIO.

Petitioner argues that the Montgomery County Community Action Agency is an instrumentality of the federal government and, therefore, is entitled to governmental immunity. Petitioner further argues that the state courts have opted for form over substance and have ignored reality.

Respondent suggests that the state courts were and are fully aware of the issues involved. The rationale of the lower court decisions was based upon state law and was correct with regard to the question sought to be raised by Petitioner. Thus, there is no substantial federal question to be decided by this Court.

Petitioner has cited the case of *Orleans v. United States*, 509 F.2d 197 (6th Cir., 1975) and has stated that the question presented in *Orleans* is the alter ego of the question presented in this petition. The issue in *Orleans* was whether the community

action council receiving funds solely from the federal government was subject to the *Federal Tort Claims Act* in an action by a *beneficiary* of the *Economic Opportunity Act*. The court found that sovereign immunity was an outmoded legal fiction and that under the narrow facts of the case, the agency was subject to the *Federal Tort Claims Act* by such a beneficiary. The court did not consider or decide the issue of whether or not a non-profit corporation, organized and existing under the laws of the State of Ohio and subject to suit under the laws of Ohio, was immune from suit in a state court because of federal immunity.

Petitioner failed to cite *Vincent v. United States*, 513 F.2d 1296 (8th Cir., 1975) which considered an identical issue to that of *Orleans* and reached an *opposite* result after having an opportunity to review *Orleans*.

Respondent stresses, however, that neither the *Vincent* nor the *Orleans* cases are determinative of the issues presented since the decision of the state court is based upon a nonfederal ground.

There is no argument between the parties that the Montgomery County Community Action Agency (hereinafter referred to as MCCAA) was organized pursuant to Chapter 1702, *Ohio Revised Code*, Ohio's non-profit corporation law. Section 1702.12 provides, in relevant part, that:

"(A) A corporation may sue *and be sued*."
(emphasis added)

A review of the pertinent federal decisions also supports the conclusion of the state courts. In *PAAC v. Rizzo*, 502 F.2d 306 (3rd Cir., 1974) the United States Court of Appeals, Third Circuit, traces briefly the history of the relevant anti-poverty legislation:

"As part of the Economic Opportunity Act of 1964,

Congress established a Community Action Program. This Program encouraged the development of local agencies to provide multiple services to impoverished communities. Originally, the Program envisioned as a goal the 'maximum feasible' participation of the poor in the development of Community Action Programs. By 1967, however, Congress recognized that the Community Action Program could not succeed without the support of locally elected officials. See 1967 U.S. Code, Congressional & Administrative News at 2448-49 (excerpted from House Report No. 866, 90th Cong., 1st Sess. 1967).

On December 23, 1967, Congress enacted the Green Amendments to the Economic Opportunity Act of 1964. These Amendments gave flexibility to the Community Action Program, permitting localities a choice in the type of 'community action agency' that would qualify for federal funding. Under the Green Amendments, the agency

> may either be a 'State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions' or it may be a 'public or private non-profit agency or organization which has been designated by a State or such a political subdivision or combination of such subdivisions.' 42 U.S.C. § 2790 (a)."

It must be assumed that the argument being advanced by Petitioner is that local law must yield to federal law under the Supremacy Clause of the United States Constitution; that MCCAA is an instrumentality of the federal government, cloaked with the attributes of a sovereign.

In *Rizzo, supra*, this proposition was examined by the Third Circuit. The agency contended that local law cannot supersede terms imposed by the Office of Economic Opportunity pursuant to federal law and that the actions of the mayor of Philadel-

phia in removing the agency director contravened the Supremacy Clause of the United States Constitution. In answering this argument, the court states, at page 314:

> ". . .there is nothing in the Economic Opportunity Act (or in the regulations promulgated in furtherance thereof) which requires localities to establish community action agencies. An agency which fails to comport with the Act's guidelines is neither illegal nor in contravention of the Supremacy Clause. Rather, it is merely an agency that may be forced to forego federal funding. In short, *the Act does not establish powers in local agencies*, but rather merely describes the powers that are prerequisites to local funding." (emphasis added)

The court then goes on to apply Pennsylvania law in determining whether or not the executive director of the agency could be removed.

Thus, it is clear that MCCAA is an offspring of state law rather than federal law. It is a creature of Chapter 1702, *Ohio Revised Code*, and derives its powers from 1702.12, *Ohio Revised Code*. While it must comply with federal guidelines to receive federal funds, it is not a sovereign immune from suit.

In *Robles v. El Paso Community Action Agency, Project Bravo, Inc.*, 456 F.2d 189 (5th Cir., 1972) the court considered and analyzed the nature and substance of community action agencies and reasoned as follows at pages 190, 191:

> "As a community action agency, the El Paso Community Action Agency Project Bravo, Inc., receives federal assistance by grant from the Office of Economic Opportunity to carry out a community action program pursuant to the provisions of the Economic Opportunity Act of 1964, Title 42 U.S.C. § 2790, et seq. It receives at the same time

funds from county agencies, local merchants, private citizens, school districts, and the City of El Paso. Once federal funds are granted for the purpose of such programs, the El Paso Community Action Agency Project Bravo, Inc., is required to carry out its program in accordance with the terms of the federal funds grant and the general and special conditions that may be laid down as the terms on which federal funds will be made available. These terms and conditions include requirements that funds be spent only for purposes specified in the approved application, requirements for accountability by means of internal fiscal controls, regular financial reports, and independent audits, and assurances against ... discriminatory treatment of beneficiaries on grounds of race or color.

Such terms and conditions do not give the Office of Economic Opportunity the right to direct the manner of carrying out the approved program,. . ."

This very passage was cited by the court in *Hines v. Cenla Community Action Committee, Inc.*, 474 F.2d 1052 (5th Cir., 1973) where the court proceeded to conclude at page 1058 that "[t]he Office of Economic Opportunity did not control the activities of CCAC so as make CCAC a public corporation" and further that the "CCAC was not a public corporation controlled by the federal government." The *Robles, supra*, passage was also cited with approval in *Johnson v. Jumelle*, 359 F.Supp. 361 (S.D.N.Y. 1973).

Thus, community action agencies are not controlled by the federal government. Moreover, federal presence and action is lacking to such an extent that the community action agency in *Hines, supra*, ". . .was not bound by the due process clause of the Fifth Amendment" in dealing with its executive director. Furthermore, the Legislative History of the *Economic Opportunity Act* sets out the federal government's function relative to the community action agencies as follows:

> "Thus, the role of the Federal Government will be to give counsel and help, *when requested*, and to make available substantial assistance in meeting the costs of those programs. (emphasis existed in original text) H.R. No. 1458, 88th Cong., 2d Sess. (1964), 1964 U.S. Code Cong. and Ad. News 2900,2909"

As demonstrated by case law and legislative history, federal involvement in community action agencies is that of extending aid to the various agencies. "It is well settled that aid given by a government to a private corporation is not enough in itself to change the character of the corporation from private to public." *Mitchell v. Boys Club of Metropolitan Police, D.C.*, 157 F.Supp. 101, 107 (D.D.C. 1957).

A look to the *Act* itself indicates that the federal government does not create, but merely "provides for Community Action Agencies." 42 U.S.C. § 2781 (a). The establishment of agencies is left to others than the federal government. Further examination of the *Act* discloses that autonomy of each individual agency in its respective community is the goal sought to be achieved. See § 2791 (e) dealing with the powers of the governing board and § 2802 (e) stating that no binding national priorities for community action agencies shall be established. See also *Johnson, supra*, at page 363.

Because the MCCAA was created by others than the federal government; because the federal government does not control the MCCAA in such a fashion as to make the agency a public corporation; because the purpose of the *Act* is to create agency autonomy which would include responsibility for its acts; it is submitted that the MCCAA's claim of federal governmental immunity is totally unwarranted.

The MCCAA is a non-profit corporation created in the State of Ohio under Ohio's non-profit corporation law. The *incorporators, and thus creators, of the agency are individuals*, not the federal government. In *Robles, supra*, the Fifth Circuit dealt with a non-profit corporation and noted at page 190 that the community action agency there involved was ". . .incorporated under Texas law, empowered to sue and be sued. . . ." So it is here. It is provided by statute that the MCCAA can be sued.

It is noted that the *Economic Opportunity Act* provides that a community action agency could be a state or something other than a non-profit corporation. But to claim that immunity exists because the agency could have been something it is not is to defy logic. It is not "fortuitous", as Petitioner's counsel would lead this Court to believe, that the agency took the corporate form.

Even a brief analysis of the corporate versus the governmental scheme of things demonstrates why the creators of the MCCAA selected the corporate form. Lack of governmental control over agency policies, activities, procedures and expenditures is the foremost advantage. As a non-profit corporation the MCCAA is able to govern itself without governmental interference. The agency, as a corporate self-governing unit is able to be more creative and innovative than the generally more conservative and slower moving government. Delays caused by administrative red tape are avoided and decisions are more quickly made because the unending governmental chain of command is non-existent in this corporate form. Having voluntarily and deliberately chosen this corporate form and having been afforded its advantages, the MCCAA is subject to the provisions of the law under which it was created. One of those provisions states that a non-profit corporation can be sued.

Hines, supra, at page 1058, labeled the community action agency there involved a "private employer." The court further

stated that because the plaintiff therein

> ". . .was not employed by the state and there was no state involvement in her employment, procedural safeguards guaranteed by the Fourteenth Amendment did not apply to her private contractual employment."

Petitioner's argument can best be answered by the following quote:

> "If each time a government lends its assistance to a private institution it were to acquire that institution as an arm of government, then government would indeed become a many armed thing." *Mitchell, supra*, at page 108

V. CONCLUSION

In conclusion, Petitioner's writ of certiorari should be denied for the following reasons:

(a) The decision of the state court is based solely upon a nonfederal ground which independently and adequately supports the judgment.

(b) Section 1702.12 (A), *Ohio Revised Code*, authorizes suit against the Montgomery County Community Action Agency.

(c) A Community Action Agency cannot in chameleon-like fashion, change its statutory identity for the sole purpose of avoiding liability in state courts under the guise of governmental immunity.

(d) A review of federal decisions on the subject overwhelmingly supports the decision of the state courts. There are no

federal decisions, including *Vincent* and *Orleans*, *supra*, which consider the identical issues presented in this case.

(e) While the Montgomery County Community Action Agency admittedly is a grantee of federal funds, it is not created by the federal government.

(f) As a non-profit corporation, the Montgomery County Community Action Agency receives funding from federal, state, county, city and private sources. The verdict will be satisfied from a combination of these sources.

We respectfully request that a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

A. OPINION OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Filed November 1, 1975)

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

Case No. 4799

JAMES W. POWERS,
Plaintiff-Appellee,

vs.

MONTGOMERY COUNTY COMMUNITY
ACTION AGENCY,
Defendant-Appellant.

OPINION

Rendered on the 1st day of November, 1975.

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KERNS, P. J.

On June 28, 1974, the plaintiff, James W. Powers, commenced this action in the Court of Common Pleas of Montgomery County claiming money damages from the defendant, Montgomery County Community Action Agency. The Complaint was based upon three separate claims for relief, (1) breach of contract, (2) false and fraudulent representations, and (3) libel and slander. The cause came on for hearing before a jury on January 13, 1975, and at the close of all the evidence, the trial court sustained a motion for a directed verdict as to the second claim set forth in the complaint. The first and third claims were submitted to the jury, and on January 17, 1975, the jury returned a $5000.00 verdict upon the first claim and a $15,000.00 verdict upon the third claim. From the judgment thereupon entered in the trial court, the Montgomery County Community Action Agency has appealed to this court.

The defendant Agency is an Ohio corporation, which was organized and exists as a non-profit corporation pursuant to Chapter 1702 of the Ohio Revised Code. Its purpose is to carry out a war against poverty. For example, it provides legal services to low-income families. It assists in child-development programs and provides housing and welfare services. It conducts a senior citizens nutrition program and a veterans program. It is also involved in services revolving around credit unions and consumer affairs. Generally, it may be said that the local agencies are set up to provide multiple services to impoverished communities.

The Agency stems from the Economic Opportunity Act of 1964, and under the terms of the Act, eighty percent of the Agency's budget comes from the federal government. The expenditure of these funds is subject to guidelines and restrictions of the Office of Economic Opportunity, which requires that an independent audit be made of the financial records of the Agency.

Prior to the commencement of this action, the fiscal depart-

ment of the Montgomery County Community Action Agency had four employees, including its Controller, James W. Powers, appellee herein. Powers was subject to the control of Melvin Jackson, the Executive Director of the Agency.

Powers was hired by the Community Action Agency on October 4, 1973 and his employment was terminated on March 27, 1974. After Powers was fired by Jackson, a number of newspaper articles were printed in the Dayton Daily News and the Dayton Journal Herald wherein Powers claimed that he was being made a "scapegoat" for a critical audit of the Agency's financial records. At about the same time, Jackson was quoted as saying that Powers was "incompetent" or "incompetent in his job".

In the present appeal, the appellant claims, for its first assignment of error, that the Montgomery County Community Action Agency is an instrumentality of the federal government and thus immune from the tort liability asserted in the plaintiff's third claim. The same issue was pursued in the trial court in a summary judgment proceeding, but the motion for summary judgment on the gound of governmental immunity was overruled.

With reference to this issue, it is significant, although not altogether controlling, that the Agency has a local origin and may sue and be sued. Section 1702.12, Revised Code. Furthermore, it is significant, though again not altogether controlling, that federal funding, with its restrictions and conditions, is not alone sufficient to change the character of a private non-profit corporation. See, *Robles v. El Paso Community Action Agency*, 456 F.2d 189.

In the present case, the Agency served as a conduit for federal funds. In fact, its conception and viability was dependent upon federal action. But aside from conditional funding, the federal government had no supervisory control of Jackson or any direct control over Agency activities. The Agency volun-

tarily established its own identity as a private non-profit corporation, and as such, it was a private employer. See, *Hines v. Cenla Community Action Committee, Inc.*, 474 F.2d 1052.

We have examined the authorities submitted by the appellant and the appellee. The cases provide hints and suggestions as to the actual status of Jackson, but none of the cases reach the question presented herein.

In our opinion, the Agency, of its own choosing is a private employer, and it cannot change its statutory identity for the sole purpose of avoiding liability under the doctrine of sovereign immunity. For good and perhaps obvious reasons, federal funding is not alone sufficient to insure sovereign immunity, and the first assignment of error is overruled.

The second assignment of error is directed to the overruling of motions for judgment notwithstanding the verdict and for a new trial as to the first claim asserted in the complaint.

Such motions are subject to the same standard, and the question presented by both was whether reasonable minds could come to more than one conclusion upon the evidence. Neither motion involved either the credibility of the witnesses or the weight of the evidence.

In applying these fundamental principles to the record in this case, this court may not intervene. There was sufficient credible evidence, if believed by the jury, to sustain the verdict, and the second assignment of error is overruled.

The third assignment of error relates to the admission of evidence of "questioned expenditures" which were made prior to Powers' tenure as Controller of the Agency. However, it was the position of the plaintiff during the trial that he was being used as a "scapegoat" for prior irregularities and that one of the principal reasons for his dismissal was because he would not cover up expenditures made prior to his tenure. Under such circumstances, the evidence was pertinent to the issues in the case and was necessary to show the conditions existing at the

time of the dismissal. We find no merit in this alleged error.

The fourth assignment of error is based upon the admission by the trial court of testimony by the plaintiff regarding his indebtedness. This testimony does have some bearing upon the issue of damages, and the extent of such testimony was a matter within the discretion of the trial court. Although it may reasonably be debated whether the appeal of such evidence to the sympathies of the jury outweighed its evidentiary value, we cannot say that the trial court abused its discretion as that term is defined in law. The fourth assignment of error is overruled.

The fifth assignment of error questions the admissibility of newspaper articles which were published at or about the time of Powers' dismissal as Controller. In support of this alleged error, the appellant alludes to the general rule that newspaper articles are not admissible to prove the facts states therein. See, 55 A.L.R. 3d 673. Here, however, the articles were not introduced to prove the truth of the matters asserted therein, but as stated by the trial court, they were introduced for the purpose of demonstrating the defamatory remarks and to show that as a natural consequence of the remarks to news reporters, the statements were published and republished over a period of time. Furthermore, the trial court admonished the jury on three separate occasions of the limited purpose for which the evidence was to be considered.

It has been held that the admission of an entire newspaper is not necessarily prejudicial error in a libel action. *Spencer v. News Pub. Co.*, 79 Ohio App. 519. Compare, *Heyman v. City of Bellevue*, 91 Ohio App. 321.

In the present case, the newspaper articles were relevant to the issues and were introduced for a legitimate purpose. The articles are attended by some objectionable material, but the opinions and hearsay reflected therein are substantially diluted by other evidence which was already known and properly before the jury for its consideration. Under such circumstances,

we are of the opinion that the form of this evidence, as admitted by the trial court, had no material effect upon the outcome of the case. The fifth assignment of error is overruled.

The evidence in this case arouses curiosity as to other legal matters, but our scope of inquiry has been limited to the five assignments of error set forth by the appellant. We find none of the alleged errors well made, and the judgment of the Court of Common Pleas will be affirmed.

SHERER and McBRIDE, JJ. concur.

B. CERTIFICATE OF SERVICE

This will certify that the Memorandum in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of Montgomery County, Ohio has been delivered to James H. Beauchamp, Attorney for Petitioner, personally by Neil F. Freund.

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